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Oscar Hackford v. Industrial Comm. Of Utah : Defendant's Brief

Utah Supreme Court

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In the Supreme Court of the State of Utah

FILED

OSCAR HACKFORD,

OV 15 1960

Plaintiff

Clerk

Supreme Court, Utah

vs.

Case No. 9330

THE INDUSTRIAL COMMISSION
OF UTAH,

Defendant.

DEFENDANT'S BRIEF

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In the Supreme Court of the State of Utah

OSCAR HACKFORD,

Plaintiff,

vs.

THE INDUSTRIAL COMMISSION
OF UTAH,

Defendant.

Case No. 9330

DEFENDANT'S BRIEF

STATEMENT OF FACTS

Except for the statement that plaintiff was employed as a sheepherder on December 31, 1957 by Deseret Livestock Company and that he was injured in the course of his employment on the said date, defendant can accept very little of plaintiff's statement of facts and therefore desires to restate the facts as follows:

Plaintiff was injured on December 31, 1957 during the course of his employment at a wage of \$200 per month

by Deseret Livestock Company. The team of horses which he was managing became startled and ran away. One or more wheels of the wagon ran over his pelvis.

Deseret Livestock Company is a Utah corporation which operates farms and ranches in Utah and elsewhere and was a self-insurer under the workmen's Compensation Act at the time of the accident. The accident occurred in Skull Valley, Utah, west of Tooele, Utah.

Immediately after the accident, plaintiff was taken to the nearest hospital, which was in Tooele, Utah, where he was X-rayed and treated by Dr. J. Herbert Milburn, M.D., of 154 South Main, Street, Tooele, Utah. The X-rays of Dr. Milburn taken at the time of his admission to the Tooele Hospital and again at the time of his release about ten weeks later, showed that the plaintiff had suffered a fractured pelvis but that the fracture had nicely healed. There was no indication whatsoever that there was any fracture of the spine as alleged in plaintiff's statement of facts.

After his release, plaintiff continued to complain of some discomfort and pain, and after consultation between the company's management and Dr. Milburn, plaintiff was referred to Dr. A. M. Okelberry, who is generally recognized by his profession as well as laymen as being an outstanding physician in this particular line. Dr. Okelberry examined plaintiff on or about August 9, 1958, and a report from Dr. Okelberry was sent to the company, to Dr. Milburn and to the Utah Industrial Commission (R-2).

In this report, Dr. Okelberry among other things stat-

ed that "There was relatively little displacement, and in the film taken in April, union of the fractures was well established." He further indicated that "While operative treatment might be required to get this man back to work, it was believed advisable to provide him with a course of eight or ten physiotherapy treatments consisting of heat massage, and special exercises to improve his strength. He will be seen for a check up examination and reevaluation in a couple of weeks. Arrangements have been made for Mr. Tage S. Sponbeck to carry out the treatments required."

Plaintiff continued under Dr. Okelberry's treatments and care but was haphazard in keeping his appointments. Since he refused to take the doctor's advice and to keep certain appointments, in May, 1959, the employer company stopped paying compensation to him to bring matters to a head. Stopping the compensation checks had the desired effect, and on June 13, 1959 plaintiff again presented himself for reexamination. A report of the results of this reexamination was prepared by Dr. Okelberry under date of July 6, 1959 (R-9) and submitted to the employer company, the Industrial Commission, and others. Part of this report states:

"Since it has not been possible to obtain a satisfactory result from the conservative methods of treatment which have been provided, and since he has been likewise unable to obtain any lasting relief from the numerous chiropractic treatments which he has apparently had, he was again advised to have a myelogram examination. With this procedure it should be possible to arrive at a still more definite diagnosis and thereby be more positive

about advising treatment. From a clinical standpoint, I believe his lumbrosacral joint should be explored for a disc rupture and a bone graft fusion done. Since Mr. Hackford does not wish to avail himself of this additional diagnostic measure, or further treatment, I believe that a settlement should be reached with him on an estimated partial permanent disability that would be expected were he to submit to the treatment above indicated. This partial disability is estimated at 15 per cent of loss of bodily function."

On June 15, 1959 by letter (R-5) plaintiff requested permission to change his doctor from Dr. Okelberry to Dr. E. F. Walters of 925 East South Temple, Salt Lake City, Utah, who is listed as an osteopathic physician and surgeon. The employer company opposed this change of doctors on the grounds that it was not to the best interests of plaintiff (R-4), and the Industrial Commission denied plaintiff's request (R-6).

Thereafter, on or about July 2, 1959, plaintiff filed an application with the Industrial Commission for determination of his claim (R-7, R-8).

Pursuant to the statute (37-1-77, Utah Code Annotated, 1953, as amended), the Industrial Commission referred the medical aspects of the case to a medical panel on August 11, 1959 (R-16) consisting of Boyd G. Holbrook, M.D., Chairman; S. W. Allred, M.D.; and Norman R. Beck, M.D. Also pursuant to the same statute, the panel made its report to the Industrial Commission on September 21, 1959, with all members of the panel signing the report (R-17, R-18, R-19). After giving detailed results of the examination, the panel report concludes:

“1. No further treatment or study is indicated.

“2. This man has 15 per cent loss of bodily function as a result of the accident and injuries he sustained.”

Plaintiff filed objection to the report of the medical panel (R-20) on or about October 19, 1959. But then instead of pursuing this objection at this time, plaintiff through his attorney attempted to bypass the Industrial Commission and the procedure set up by statute for such matters and filed a complaint against Deseret Livestock Company in the District Court of Salt Lake County, State of Utah (Case No. 124694) seeking judgment against the employer company. The employer company was served with a summons in this case March 10, 1960, and in due time entered a special appearance to make a motion to dismiss the complaint on the grounds the district court had no jurisdiction, which motion was granted by the district court on March 24, 1960.

On March 31, 1960 plaintiff asked for a hearing on his objections to the medical panel report and pointed out that the doctors making the report should be required to attend to be available for examination and cross-examination (R-22). Shortly thereafter, on April 19, 1960, the commission called a hearing on the plaintiff's application for adjustment of claim (R-23), and pursuant to said call the hearing was held May 16, 1960, presided over by Commission Chairman Otto W. Wiesley as referee, and attended by all members of the said medical panel as well as the parties and their attorneys.

On June 16, 1960, the commission rendered its decision, which decision, signed by all members of the commission, found that the said accident had resulted in permanent partial disability of 15 per cent loss of bodily function which would entitle plaintiff to compensation for 30 weeks at \$35 per week, or \$1,050; further that any disability over and above the 15 per cent loss of bodily function was caused by degenerative arthritis not related to or aggravated by the injury. (R-61, R-62).

On July 7, 1960 plaintiff filed a motion for rehearing (R-63), which motion was denied (R-64). From this denial order plaintiff obtained a writ of review from this court.

STATEMENT OF POINTS

POINT I.

PLAINTIFF WAS NOT DEPRIVED OF LIFE, LIBERTY, OR PROPERTY WITHOUT DUE PROCESS OF LAW.

POINT II.

THE COMMISSION DID NOT ACT ARBITRARILY OR EX PARTE BUT RATHER FOLLOWED THE PROCEDURE SET UP BY STATUTE.

POINT III.

THE AWARD IS NOT CONTRARY TO THE EVIDENCE AND THE LAW.

POINT IV.

INDUSTRIAL COMMISSION FINDINGS OF
FACTS ARE CONCLUSIVE AND FINAL.

POINT V.

PLAINTIFF'S POINT NO. IV HAS NO PARTICULAR APPLICATION HERE.

ARGUMENT

POINT I.

PLAINTIFF WAS NOT DEPRIVED OF LIFE,
LIBERTY, OR PROPERTY WITHOUT DUE
PROCESS OF LAW.

In answer to plaintiff's argument I. (plaintiff's brief, pages four and five and six), the procedure to be followed in such cases is duly set up by statute and/or the constitution of the state of Utah; said procedure therefore constitutes due process of law; and said procedure was followed in detail in this matter.

Section 35-1-31, Utah Code Annotated, 1953, cited by plaintiff (plaintiff's brief, page five) as legal proof that the commission's acts herein were a "complete nullity" is not applicable in any way to this case, as is evident on its face. Plaintiff has questioned the authority of the referee to take testimony.

It is well established by law, decision of this court, and custom, that the Industrial Commission does have the

power and authority to delegate to a deputy or a member of the commission the power under the Workmen's Compensation Act to take testimony in such matters. This practice has been followed almost universally by the Industrial Commission since its inception in 1917. In addition, Section 35-1-10, Utah Code Annotated, 1953, gives the commission the power to adopt rules and regulations governing procedure before it, and Section 35-1-11, Utah Code Annotated, 1953, authorizes the commission to employ a secretary, examiners, experts, clerks, physicians, stenographers, and other assistants.

In *Utah Copper Company vs. Industrial Commission of Utah, et al*, 193 P 23 (decided October 22, 1920), this court held that the Industrial Commission may delegate to a deputy the power under the Workmen's Compensation Act to take testimony. In that case, testimony upon which an award was made was taken before a referee, who was not even a member of the commission. Appellant's counsel objected on grounds that the commission had no power or authority to delegate to a referee the right to hear testimony, moved to stay the proceedings, and requested that the application be heard before the commission or some members thereof. This court held that the commission could appoint a referee to take the testimony, but that the referee does not and can not make any award or make any binding order respecting an award. In the instant case, the referee was the chairman of the Industrial Commission, but he made no decision or award. The findings, conclusions and order were made and signed by the entire commission (R-17, R-18, R-19). This practice of designating one member as a referee or a non-member

referee to take testimony is almost universally followed by most of the administrative commissions of the Utah state government. We submit that a requirement that all commissioners be present at all hearings, wherever held, would be expensive and would work an almost impossible hardship on them in the conduct of their official duties.

POINT II.

THE COMMISSION DID NOT ACT ARBITRARILY OR EX PARTE BUT RATHER FOLLOWED THE PROCEDURE SET UP BY STATUTE.

Much of the argument which could be advanced under this point is contained in the foregoing under Point I. of this brief. From the outset this claim was handled in detail by the commission in the manner set up by statute as the record in this case shows. The action and decision of the commission were based on the investigation of medical men who were appointed and who conducted their inquiries in accordance with law. A hearing was given plaintiff as soon as he requested one after he had taken a futile side jaunt into the district court, and any and all statements made by the commission or its chairman were not opinions but were based upon the scientific findings of highly qualified medical men duly appointed to make such findings. Plaintiff attempts to show bias on the part of the commission chairman, but this honorable court has known Chairman Wiesley and his record over a period of 18 years. We do not feel it is necessary to defend his performance and his record so well known to this court.

Plaintiff attempts to attack the admissibility, validity, or competence of the medical panel's report, and by in-

ference the reports by Dr. Okelberry, to be found in the record. The basis of this attack is not clearly stated, but it is indicated by plaintiff that the medical panel report was influenced by the commission chairman and that it was not made under oath. There is no law or custom which requires such reports to be made under oath.

As to the admissibility and competence of the medical panel's report, this court has held such reports admissible and competent under similar circumstances.

In *Uta-Carbon Coal Company et al, vs. Industrial Commission, et al*, 104 Ut. 567, 140 P2nd (decided by this court July 29, 1943), plaintiff attacks the competence of X-rays and a diagnosis report made to the Industrial Commission by an X-ray specialist to whom the employee had been sent by the Industrial Commission pursuant to statutory requirement.

Concerning it, this court says, in part:

"It is our opinion that a report of this type comes within the exception to the hearsay rule and is such a one as is described in Rule 516, American Law Institute's Model Code of Evidence, pages 275, 276, to wit: . . . evidence of a writing made as a record, report, or memorandum of facts and conclusions concerning an act, event, or condition. . . is admissible as tending to prove the truth of each matter stated therein in compliance with statutory requirements if . . . (a) the maker of the writing was duly authorized pursuant to statute to perform designated functions, performance of which by persons not so authorized was forbidden by statute,

and was required by statute to file a written report in a designated place or office setting forth specified matters relating to the performance of those functions and the persons or things connected therewith, and (b) the writing was made and filed by him as a report so required by the statute.”

This is exactly the case now before the court with the medical panel report. It was required by Section 35-1-77, Utah Code Annotated, 1953, and the procedure set up there was followed.

We believe that the law is well established that in civil code procedure it is the general rule that all documents and writings required by statutes and prepared and filed in accordance therewith are prima facie evidence of what they contain. They, of course, can be challenged by other evidence or their contents attacked or contradicted or refuted by proper evidence, but otherwise they stand as evidence for what they purport to be.

The three medical panel doctors were present at the hearing to be available to the plaintiff for examination or cross-examination pursuant to plaintiff's written request (R-22), but at the hearing plaintiff decided against cross-examining any of the medical panel doctors or questioning their report. And plaintiff's failure to in any way question the panel physicians or their report was no oversight, it was more of an adamant refusal to do so. Note exchange between plaintiff's counsel, Mr. Oliver, and referee (R-41, beginning line 20):

“MR OLIVER: I'll call Mr. Hackford.

THE REFEREE: Just a moment. We have these three panel doctors here. Do you want to cross-examine them?

MR. OLIVER: No.

THE REFEREE: You don't?

MR. OLIVER: No.

THE REFEREE: You should have told us. These people cost money to bring them up here.

MR. OLIVER: I didn't ask you to bring them up here.

THE REFEREE: We have to under the law. If you don't want to cross-examine them, we'll excuse them.

MR. OLIVER: No. I don't have any cross-examination."

(Discussion off the record).

"THE REFEREE: You may proceed."

During the discussion off the record and again later on during the hearing and on the record, counsel for the employer was assured by the referee that the case history and the medical panel report were in evidence as part of the record. At page 50, beginning on line 9, there is this exchange:

"MR. OLIVER: I believe you may cross-examine (the plaintiff was on the stand).

MR. ROBINSON: Mr. Chairman, we think the record has the case history of this. Is there any point in going into it here?

THE REFEREE: No.

MR. ROBINSON: His refusal to go to Dr. Okelberry on certain occasions and to accept the treatments suggested?

MR. OLIVER: Just a minute. I object to that.

MR. ROBINSON: I'm asking a question.

THE REFEREE: Now wait a minute, both of you. The Supreme Court of the state of Utah says everything in this record is in evidence.

MR. OLIVER: Well, the medical report is not in evidence. The statute prohibits it.

THE REFEREE: No, it isn't prohibited.

MR. ROBINSON: I didn't want to unnecessarily prolong this hearing if it's all repetitious.

THE REFEREE: It's in.

MR. ROBINSON: If the case history is in the record (and) the medical report of the panel, I only have one or two questions, and those are these."

Even though this court had not held that writings and documents required by law are admissible as evidence (*Uta-Carbon Coal Co. vs. Industrial Commission, supra*), the referee, acting for and on behalf of the commission, was within his authority in ruling that the medical panel re-

port and documents giving the case history of the claim were, as part of the record, in evidence.

Section 35-1-88, Utah Code Annotated, 1953, says:

“Rules of evidence before commission. The commission shall not be bound by the usual common law or statutory rules of evidence, or by any technical or formal rules of procedure, other than as herein provided; but may make its investigations in such matter as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this title.”

Thus the commission did not act arbitrarily or ex parte in deciding this case. All the medical reports and facts were weighed, a medical panel of three outstanding physicians and surgeons were ordered to investigate and report, and then a hearing was held, at which hearing testimony of plaintiff's own medical witnesses in no way contradicted, but rather agreed with the findings of Dr. Okelberry and the medical panel, which was not at variance with Dr. Okelberry's findings.

Dr. L. H. O. Stobbe, plaintiff's principal medical witness, testified in response to plaintiff counsel's questioning (R-29):

“Q. Did you examine his back?

A. Yes.

Q. What condition did you find there?

A. As said before, cyposis (?) and scoliosis. Tilting. Dimpling.

Q. And Doctor, did you determine the cause of that condition

A. We X-rayed his back, and found there a degenerative arthritis involving the intervertebral discs between the 11th and 12th dorsal vertebra, and between the 12th dorsal and the first lumbar vertebra. Otherwise we found a fairly normal spine.

Q. From your examination of the back that you have just described, did you determine from your examination whether it had ever been broken at any time? Or fractured?

A. No, sir I couldn't find that. Furthermore, the hip regions and pelvic areas were surprisingly good considering the general condition of the patient."

And then, under cross-examination of Dr. Stobbe by employer's counsel: (R-33).

"Q. Dr. Stobbe, did you in your examination determine what injury had occurred from the accident?

A. I'm afraid I couldn't. It was too far removed from the time of the accident. I discussed this with Dr. Okelberry and with the Deseret Livestock Company on February 4, 1960.

Q. Would you disagree with Dr. Okelberry in any of his findings, after your examination?

A. I think there was nothing there for us to disagree on."

POINT III.

THE AWARD IS NOT CONTRARY TO THE
EVIDENCE AND THE LAW.

Most of plaintiff's arguments and citations under his point numbered III. are either not applicable here or have been answered herein above.

Plaintiff's allegation that there was a prolonged delay between the time he requested a hearing March 31, 1960 (after his meandering into the district court) and the hearing date, May 16, 1960, is not well founded. The hearing was called by the commission on April 19, 1960, only 19 days after the date of plaintiff's request and was held 26 days thereafter, a total lapse of 45 days. The demands of proper notice would consume this amount of time, and for plaintiff's counsel to complain over this short lapse of time and attempt to make it reversible error is the height of indelicacy after he wasted nearly six months in "off-side maneuvering."

Plaintiff (on page 12 of his brief) claims he had no pre-hearing knowledge of a letter written to the employer by Dr. Okelberry on July 6, 1959 (R-9), a copy of which was sent to the Industrial Commission by the doctor, and plaintiff alleges this lack of knowledge on his part to be reversible error. Plaintiff's counsel may be entitled to a word of regret from Deseret Livestock Company if he did not get a copy of this letter, and in such case an apology is hereby extended on behalf of the company. But whether or not plaintiff had pre-hearing knowledge of the July 6, 1959 letter from Dr. Okelberry is immaterial to the decis-

ion in this case, since it was not an official writing nor one required by statute. The medical panel report was the official writing required by the statute, and when its finding and conclusions were not in any way contradicted or varied by the other testimony, it became the basis of the commission's award.

Plaintiff makes no claim that he did not have knowledge of or a copy of the medical panel report, and, of course, he did have both, as the record shows he objected to the report (R-20).

Plaintiff's brief makes a somewhat half-hearted attempt to show that plaintiff's present physical condition (misalignment and arthritis of the spine) was caused by the accident.

There is not one scintilla of evidence anywhere in the record that the accident injured plaintiff's spine. In fact, every attempt by plaintiff counsel to drag an injured spine into his case has been completely frustrated by the testimony of even his own expert witnesses (Dr. Stobbe testimony, R-29, R-30, *supra*). And Dr. Hugh Wayman, plaintiff's other medical witness, testified on direct examination by plaintiff counsel (R-40):

"Q. Well assume, Doctor, that Mr. Hackford had been in an accident where a wagon wheel ran over him and broke his back in that location. Would that cause it?

A. Well, I see no sign of breaks at all. I only see misalignment in them. The accident as you speak of could cause this misalignment."

And then on cross-examination, Dr. Wayman said (R-41):

“Q. You say it could cause it but you also say there are also other things that could cause that misalignment, Doctor?”

A. I have found the same condition in some cases that were not run over.”

In this connection, it should be remembered that Dr. Wayman first examined the plaintiff sometime “in 1958” (R-36, line 19) and that he made his first X-rays of plaintiff “probably nine months after I checked him first.” (R-37). So these first X-rays by Dr. Wayman were taken 12 to 20 months after the accident and would be of little use in determining what damage the accident had caused to the spine.

POINT IV.

INDUSTRIAL COMMISSION FINDINGS OF FACTS ARE CONCLUSIVE AND FINAL.

As against plaintiff's weak and futile attempts to blame the accident for plaintiff's present physical condition, we have a positive finding of fact by the Industrial Commission that “any disability over and above the 15 per cent loss of bodily function was caused by degenerative arthritis not related to or aggravated by the injury of December 31, 1957.” (R-62).

Section 35-1-85, Utah Code Annotated, 1953, recites:

“ . . . After each formal hearing, it shall be the duty of the commission to make findings of fact and conclusions of law in writing and file the same with its secretary. The findings of fact and conclusions of the commission on questions of fact shall be conclusive and final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission. . .”

This question was ruled upon most recently by this court in the case of *Park Utah Consolidated Mines Co. vs. Industrial Commission*, 84 Ut. 481, 36 P.2d 972, wherein the court said in part:

“ . . . In the determining of facts the conclusions of the commission are like the verdict of a jury, and will not be interfered with by this court when supported by some substantial evidence.”

We submit that under the case and statute cited, the Industrial Commission's findings of fact in this case are conclusive and final and are not subject to review.

POINT V.

PLAINTIFF'S POINT NO. IV HAS NO PARTICULAR APPLICATION HERE.

Plaintiff's point No. 1V. to the effect that “Equity Will Provide a Remedy Where None Exists at Law” cannot be raised in this appeal. Since the relief sought below and the proceeding thereunder is purely statutory, no equity or equitable remedy is available.

CONCLUSION

The only issue before this court is the degree of permanent disability resulting from the accident. The plaintiff claims that he is totally and permanently disabled but has utterly failed to prove that his total disability, if such exists, is the result of the accident.

On the other hand, the Industrial Commission, as the legally constituted finder of the facts, has determined that plaintiff's disability resulting from the accident is 15 per cent loss of bodily function and made an award accordingly. This determination is based principally on the investigation and findings of a medical panel of three outstanding medical men, and on the supporting report of Dr. A. M. Okelberry and the supporting testimony of Dr. L. H. O. Stobbe, the plaintiff's own witness.

Under all the circumstances, we submit that this finding of fact and the award which was made by the commission pursuant thereto are conclusive and final, and should accordingly be affirmed.

Respectfully submitted,

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